



BENTON POTTER & MURDOCK P.C.

SUBCONTRACTING IN GOVERNMENT MARKETPLACES

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WHY GOVERNMENT CONTRACTING

- The federal government is the largest purchaser of goods and services in the world.
- For fiscal year 2014, the federal government spent \$443.6 billion in contracting.
- Add the billions spent on government contracting at the state and local levels and it all adds up to one huge market you don't want to ignore.

WHY SUBCONTRACTING?

- Provides excellent opportunity for small businesses to:
 - Grow in size, revenues, experience, and capabilities
 - Develop a past performance record
 - Develop long-lasting business partnerships
 - Become more competitive in the government contracting marketplace

SOME TERMS TO KNOW

- A GOVERNMENT CONTRACTOR is any entity that provides goods or services for federal, state, or local governments.
- A PRIME CONTRACTOR is the entity that has a direct and legally binding relationship with the government to furnish goods or services.
- A SUBCONTRACTOR is an entity that furnishes supplies, equipment or services of any kind directly to the prime contractor (first-tier subcontractor) or another subcontractor (lower-tier subcontractor) to perform some of the tasks required by the prime contract.

PROCUREMENT LAWS AND REGULATIONS

- Government contractors and subcontractors are subject to a host of laws, regulations, and executive orders designed to ensure that procurements are competitive, fair, and advantageous to the taxpayer, and cover all areas of the procurement process from pre-solicitation to final award of a contract. They govern, for example:
 - The methods and procedures that executive agencies must follow before entering into a government contract;
 - Issues relating to the performance of the contract and the rights and responsibilities of the parties, including contract disputes, and contractor misconduct;
 - The manner in which business is conducted, including ethics, codes of conduct, fiscal responsibility, and obligations which are imposed for the privilege of doing business with the government.

PROCUREMENT LAWS AND REGULATIONS

- At the federal level, the main body of procurement regulations are the Federal Acquisition Regulation (“FAR”).
- Some agencies have their own regulations that supplement the FAR.
 - E.g., DFARS – Defense Federal Acquisition Regulation Supplement utilized by the Department of Defense, and GSARS – General Services Administration Acquisition Regulation.
- Some agencies by Congressional authority do not follow the FAR, but have their own comprehensive body of procurement law.
 - E.g., Federal Aviation Administration

PROCUREMENT LAWS AND REGULATIONS

- Other federal laws applicable to government contracting include:
 - The Small Business Administration (“SBA”) Act, its various amendments, and implementing regulations
 - Cost Accounting Standards
 - The Office of Federal Contracting Compliance Program (“OFCCP”) – affirmative action, equal employment opportunity, Americans with Disabilities.
 - Labor laws, including the Service Contract Act, the Davis-Bacon Act, and the Walsh-Healy Act
 - Executive Orders

PROCUREMENT LAWS AND REGULATIONS

- Other federal laws applicable to government contracting include:
 - The Buy American Act
 - The Truth in Negotiations Act
 - The Trade Agreements Act
 - The Federal False Claims Act
- State and local governments follow their own procurement laws, some of which are analogous to federal laws and some of which are not. Many states also have their own false claims acts.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES

THE SMALL BUSINESS SUBCONTRACTING PROGRAM

On contracts for more than the simplified acquisition threshold (currently \$150,000), prime contractors must:

- Agree in the contract that small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with efficient performance of the contract.
- Establish procedures to ensure the timely payment to subcontractors of amounts due pursuant to their subcontract with small businesses.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES

THE SMALL BUSINESS SUBCONTRACTING PROGRAM

Solicitations for contracts that are expected to exceed \$650,000 (\$1.5 million for construction) and that have subcontracting possibilities must require:

- The successful offeror/awardee to submit and negotiate a subcontracting plan acceptable to the contracting officer. Failure to do so renders the contractor ineligible for award.
- In negotiated procurements, the contracting officer may require the submission of subcontracting plans with initial offers, or at any other time prior to award.
- In making contractor responsibility determinations, contracting officers must consider the prospective contractor's compliance with subcontracting plans under recent contracts.
- No subcontracting plans required from small businesses, for personal services contracts, or for contracts performed entirely outside the U.S.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES

THE SMALL BUSINESS SUBCONTRACTING PROGRAM

COMPLIANCE

- Prime Contractor must comply in good faith with the requirements of the approved subcontracting plan.
- A willful or intentional failure to comply with the requirements of the approved subcontracting plan leads to the imposition of liquidated damages on the Prime Contractor and could lead to a negative past performance evaluation.
- Small Business Act amendments in 2010 enacted additional protections for subcontractors, although the FAR has not been revised to incorporate protections.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES

THE SMALL BUSINESS SUBCONTRACTING PROGRAM

Eligibility of business entity to participate as subcontractor

- A concern must represent itself as one or more of the following:
 - Small business or small-disadvantaged business
 - Veteran-owned or service-disabled veteran-owned small business
 - A HUBZone small business
 - A women-owned small business
- Categories have very specific definitions and standards set forth in the FAR and SBA regulations.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES GOALING

- Statutory goal of 23% for small business prime contracting.
- Statutory goals for certain small business categories, whether prime or subcontracting: 5% for small disadvantaged, women owned, HUBZone entities, 3% for small disadvantaged veteran owned small businesses.
- SBA negotiates with agencies to establish overall small business subcontracting goals: in FY 2014, these individual agency goals ranged from 17% to 60% of total prime dollars.

SUBCONTRACTING OPPORTUNITIES FOR SMALL BUSINESSES STATE AND LOCAL GOVERNMENTS

Many state and local governments have programs or laws to ensure the utilization of small business subcontractors, e.g.:

- Texas HUB Subcontracting Plan for contracts over \$100,000
- DC requirement for contracts over \$250,000 to have a subcontracting plan

ADVANTAGES OF SUBCONTRACTING

- Excellent opportunity to grow your business in size, revenues, and capabilities
- Develops a past performance record
- Can involve less administrative burden than for prime contractors
- Develops long-lasting business relationships
- Positions your company with capabilities to win a prime contract
- Governments represent a large market

ADVANTAGES OF SUBCONTRACTING

- Governments generally pay their bills and pay timely
- Federal, state, and local governments want to work with small businesses
- Prime contractors with subcontracting requirements are looking for you

LEGAL PROTECTIONS FOR SUBCONTRACTORS

- Miller Act
 - Requires payment bond in construction contracts to protect all persons providing labor or materials required for contract performance
- Prompt Payment Act
 - Establishes timeline for payments to prime and subcontractor
- Obama Administration Payment Policies
 - Accelerated Payment Policy supplements the Prompt Payment Act
- State laws

GETTING STARTED

- Find the NAICS code or codes that best describes your business.
 - Go to <http://www.census.gov/eos/www/naics> to view the various NAICS codes
- Determine if you qualify as a small business under the NAICS codes, which are based on either revenues or number of employees.
 - Go to <http://www.sba.gov/content/table-small-business-size-standards> for information on size standards

GETTING STARTED

- Obtain a DUNS Number
 - Visit <http://fedgov.dnb.com/webform> to apply for a number.
- Register on System for Award Management (“SAM”)
 - Provide information about your company, and make certifications and representations
 - Go to <https://www.sam.gov/portal/SAM/##11>
 - Ensure that you enter all required information accurately and completely as system is sensitive to mistakes

GETTING STARTED

- Networking
 - Key to obtaining subcontracting opportunities and building relationships
 - Attend expos, trade shows, and annual conferences sponsored by large businesses and government agencies

GETTING STARTED

- Resources

- <http://web.sba.gov/subnet>. Prime contractors can place solicitations and subcontractors can post notices
- <https://www.sba.gov/subcontracting> directory. Listing of prime contractors who have submitted a subcontracting plan
- <http://www.gsa.gov/ebuy> directory.

GETTING STARTED

- <http://www.APTAC-us.org>. The Association of Procurement Technical Assistance Centers is the professional organization of and for the Defense Logistics Agency funded Procurement Technical Assistance Centers.
- <http://www.fbo.gov>. This government website is where solicitations and notices of intent to award are posted.
- <http://www.fpds.gov>. The Federal Procurement Data System posts contracts that have been awarded and provides information about the awardee.

ESTABLISHING A RELATIONSHIP WITH THE PRIME CONTRACTOR

- Teaming Agreements
 - Pre-award agreement that prime and subcontractor will enter into a subcontracting agreement if prime is awarded the contract
 - Requirements for enforceability
- Confidentiality or Non-Disclosure Agreements: critical to protecting proprietary information
- Subcontracting Agreement
 - Post-award formal, enforceable agreement that sets out in more detail the rights and responsibilities of the parties

THINGS TO WATCH OUT FOR

- Flowdowns: Certain clauses in prime contract with federal government are required by law or regulation to be “flowed down” to subcontractors.
- Avoiding affiliation with prime: Preserve your small business status.
- No privity of contract with government: Disputes can either be resolved via state law or federal law, depending on issue, but subcontractor do NOT have direct cause of action against Federal Government.
- False Claims Act: Civil and criminal penalties for making or causing to be made a false claim to the government for payment.

Ms. Potter is a Member and Cofounder of Benton Potter & Murdock. She represents and advises corporate clients in the areas of government contracting, labor and employment, and health care. Her government contracts practice includes matters involving: bid protests before GAO, agencies, and federal courts; DOL and OFCCP audits and investigations; teaming agreements; contract disputes between prime contractors and subcontractors; termination for convenience and default; SBA compliance and regulatory issues for small business programs; size protests; Service Contract Act and Davis-Bacon Act wage and hour issues; affirmative action plans; and Federal Acquisition Regulation issues.

Ms. Roach is Of Counsel to Benton Potter & Murdock. She represents and advises corporate clients in the areas of government contracting and construction. Her government contracts practice includes matters involving: federal and state contract formation, including legal review of requests for proposals, requests for lease proposals, requests for quotations, and invitations for bids; teaming agreements, strategic alliances, and subcontract formation; novations and contract assignment issues; contract and lease administration, including equitable adjustments, and matters relating to claims and the Contract Dispute Act; termination for default or convenience matters; ethics, procurement integrity, organizational conflicts of interest, and responsibility matters; and confidentiality and non-disclosure agreements.

Prior to becoming Of Counsel to Benton Potter and Murdock, Ms. Roach served in various capacities as a senior executive with the General Services Administration including, but not limited to, Regional Counsel for the National Capital Region, Associate General Counsel for Real Property, and Assistant Commissioner for Strategic Innovations. She was a key participant in complex procurements, real estate transactions, and acquisition reforms while at GSA and received the Presidential Rank Award for Meritorious Service in recognition of her contributions.

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